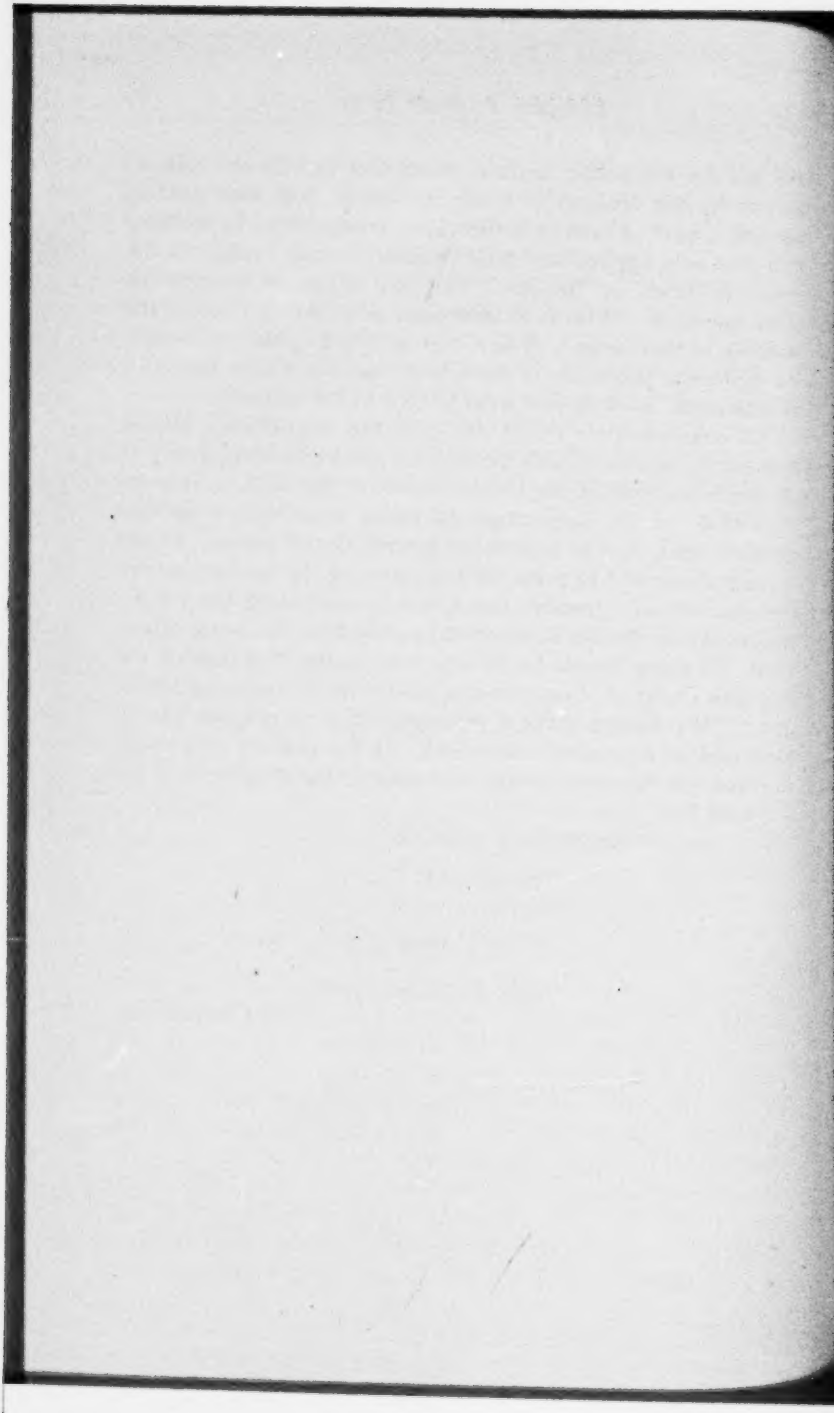

(18,745)

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 165.

Office Supreme Court U. S.
FILED
JAN 18 1904
JAMES H. McKENNEY,
Clerk.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY,

PETITIONER,

vs.

BENJAMIN F. JONES ET AL.,

RESPONDENTS.

## BRIEF FOR RESPONDENTS.

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## BRIEF FOR RESPONDENTS.

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The controversy in this cause presents but two questions:

**1. On the record of this case is this court bound to follow the decision of the Supreme Court of Ohio declaring the statute in question unconstitutional?**

**2. Does that statute contravene any provision of the Constitution of Ohio?**

Our contention is that both these questions should be emphatically answered in the negative.

Inasmuch as we claim that the respondents made the contract and furnished materials as required thereby on the faith of the statute, and before it had been overthrown by the Supreme Court of Ohio, and inasmuch as counsel for petitioner intimates that materials under respondents' contract were furnished while the statute was under fire, and at least weakened by the decision of a Circuit Court of that state, we consider it well to array certain facts in their chronological order at this point.

1. The law in question was passed April, 1894.

2. The contract for building the hotel between the petitioner and McClain, the principal contractor, was made October 10, 1894. (Brief for Petitioner, p. 4.)

3. The contract between respondents and McClain, December 13, 1894. (Brief for Petitioner, p. 4.)

4. The last item of material was furnished under the latter contract January 28, 1896. (Record, p. 10.)

(All the material under this contract was furnished during the year 1895, except two items aggregating $350.49.)

5. Affidavit for lien under the statute filed April 21, 1896. (Brief for Petitioner, p. 5.)

6. Decision of Circuit Court of Putnam county against the law, November 15, 1895.

7. Decision of the Circuit Court of Clark county, sustaining the law, December 14, 1895.

(The dates of these decisions of the Circuit Courts have been ascertained from the records filed in the Supreme Court of Ohio, and will not be disputed.)

8. Decision of the Supreme Court of Ohio, overthrowing the law, December 8, 1896. (55 Ohio State Rep., 423.)

Were we at liberty to indulge the absurd theory that the respondents were presumed to have notice of the pendency of the actions, and the decisions of these inferior courts construing the statute in question, then instead of being put upon their guard against furnishing what little balance of materials there was remaining to be fur-

nished under their contract, they would have found that one of these courts had declared against the law, and the other of equal authority in its favor. The latter decision was the one favorable to the law, and it is to be presumed that it had before it the conclusion reached by the other court, its reasons therefor, and that those reasons were pronounced unsound and the conclusion wrong. It is unnecessary to dwell further upon this point.

It is suggested by the other side, page 61 of the brief that—

> "There is no showing that their (Jones' and Laughlin's) claims could not be collected by law from McClain without relying upon the lien."

Learned counsel have overlooked the averment of the amended bill where it is expressly alleged, in the sixth paragraph:

> "that on the first day of August, 1896, the said William J. McClain made and filed in the Probate Court of Franklin County, Ohio, a deed of assignment for the benefit of his creditors to F. Burt Milligan; that said William J. McClain is wholly insolvent and unable to pay the claims of your said orators." (Record, p. 5.)

The answer to the amended bill is found on pages 12-14 of the record, and there is no denial of this allegation, either general or specific.

## I.

### This Court not bound by the decision of the Ohio Supreme Court.

Taking up the two questions here presented in the order stated, we maintain that the decision of the Supreme Court of Ohio, above referred to, is not binding upon the United States Courts for the following reasons:

1. The cause of action set out in the amended bill accrued before the decision of the Supreme Court of Ohio was rendered or announced.

2. The former decisions of the Supreme Court of Ohio upon similar contracts and liens, are in conflict with that decision, and the cause of action accrued before such former decisions were reversed by the holding in *Young vs. The Lion Hardware Company.*

3. The constitutional question is one of general constitutional law, not peculiarly applicable to the Constitution of the State of Ohio, but equally applicable to any and all Constitutions, including State and Federal.

4. The question is one of general jurisprudence and commercial law.

I.

Respondents were non-residents of the State of Ohio when they examined the statutes and ascertained their rights before making their contract and furnishing the labor and material, and had the right to presume that the statute was constitutional, and that their rights would be protected thereunder, and under these circumstances, we think that the decisions of this Court have clearly established that this Court will act independently of the Ohio Court, and while giving due weight to its decision, will still of itself and independently of the Ohio Court, decide whether or not said law was in fact unconstitutional.

In *Burgess vs. Seligman,* 107 U. S., 20, Justice Bradley, speaking for the Court, on page 33 says:

> "When contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or where there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued."

And after stating that the Courts of the United States will endeavor to avoid any unseemly conflict with the well-considered decisions of the State Court, he says:

"As, however, the very object of giving to the national Courts jurisdiction to administer the laws of the States in controversies between citizens of different states, was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

In *Anderson vs. Santa Anna Tp.*, 116 U. S., 356, Justice Harlan, on page 362, in delivering the opinion of the Court, says:

"In *Burgess vs. Seligman*, 107 U. S., 20, 33, the Court had occasion to re-examine all its prior adjudications concerning the obligation of the Federal Courts, to follow the decisions of the State Courts upon questions of local law. Mr. Justice Bradley, speaking for the whole Court, after observing that the Federal Courts had an independent jurisdiction in the administration of state laws co-ordinate with and not subordinate to that of the State Courts, and are bound to exercise their own judgment as to the meaning and effect of these laws, said: 'So when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases for the sake of harmony and to avoid confusion, the Federal Courts will lean to an agreement of views with the State Courts if the question seems to them balanced with doubt.' Any other rule, it was further said, would defeat 'the very object of giving to the National Courts jurisdiction to administer the laws of the states in controversies between citizens of different states.'"

Judge Lurton, in delivering the opinion of the Circuit Court of Appeals below, reported 86 Fed., 370, at page 372, referring to the case of *Young vs. The Lion Hardware Company*, 55 Ohio State, 423.

"Does that decision furnish a rule of decision which is obligatory upon Courts of the United States? When a citizen of one state enters into a contract with a citizen of another, he acquires the constitutional right to have that contract interpreted and enforced by a Court of the United States. That right does not by any means involve the application of a different rule of de-

cision, for the judiciary act requires that the laws of the several states shall be regarded as rules of decision, in trials at common law, where they apply. But even the decision of the highest courts of the state by whose law the rights of the parties are to be ascertained and enforced, does not, under all circumstances, furnish a rule of decision obligatory upon courts of the United States. The question is, when do they apply? In the past, this inquiry has involved no little friction between the Courts of the Union and those of the states. But the final arbiter of all such constitutional questions is the Supreme Court of the United States. So far as the inquiry is pertinent to the decision which must be here made, that Court has in an authoritative way decided:

"1. That such decisions are not necessarily obligatory upon Courts of the United States where they effect contracts which were valid under the Constitution and laws of the state as interpreted and enforced by its highest judicial tribunals at the time they were entered upon.

*Rowan vs. Runnels*, 5 How., 134.
*Ohio Life and Trust Co. vs. Debolt*, 16 How., 432.
*Gelpcke vs. The City of Dubuque*, 1 Wall., 175.
*Olcott vs. The Supervisors*, 16 Wall., 678.
*Taylor vs. Ypsilanti*, 105 U. S., 60.
*Douglass vs. County of Pike*, 101 U. S., 677.
*Louisville Trust Co. vs. Cincinnati*, 47 U. S. pp. 36, 46.

"In *Rowan vs. Runnels*, supra, Chief Justice Taney said: 'Undoubtedly this court will always feel itself bound to respect the decisions of the State Courts, and from the time they were made regard them as conclusive in all cases upon the construction of their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which in the judgment of this Court, were lawfully made.'

"In *Douglass vs. County of Pike*, cited above, the Court, after reviewing the preceding cases, decided by that Court, said: 'The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes

the same in its effect on contracts as an amendment of the law by means of a legislative enactment.'

"2. Neither are such decisions obligatory upon Courts of the United States when thereby the validity of contracts between a citizen of the state and a citizen of another state is affected which were executed before there was any judicial construction of the statute or constitution which seemed to authorize the contract in question.

*Burgess vs. Seligman*, 107 U. S., 20-33.
*Pleasant Township vs. Aetna L. Ins. Co.*, 138 U. S., 67-72.
*Louisville Trust Co. vs. Cincinnati*, 47 U. S. A., pp. 36-47."

We call especial attention to the opinion of Judge Lurton, in discussing this proposition of law, on page 373, of 86 Fed.

The same rule of law is recognized in *Miller vs. Ammon*, 145 U. S., 421, in the opinion of the court on page 423, where

*Burgess vs. Seligman*, 107 U. S., 20;
*Carroll County vs. Smith*, 111 U. S., 556;
*Gibson vs. Lyon*, 115 U. S., 439, and
*Anderson vs. Santa Anna Township*, 116 U. S., 356,

are cited as instances in which this court did not consider itself bound by the decisions of the state courts.

In *Burges vs. Seligman*, supra, Justice Bradley, in delivering the opinion of the court, said:

"We do not consider ourselves bound to follow the decision of the state courts in this case."

*Pleasant Township vs. Aetna Life Insurance Co.*, 138 U. S. 67, was a decision in which this court refused to follow the construction placed upon the law by the state court, although after an independent examination they reached the same conclusion. That was a case in which the constitutionality of the Ohio statute was brought in question; and the Supreme Court of Ohio decided the law was repugnant to the Constitution of Ohio in *Wyscaver vs. Atkinson*, 37 O. S. 80. After the bonds had been issued, in a suit upon certain of these bonds in the case above referred to in this court, Justice Brewer, on page 72, in delivering the opinion of the court, said:

"We are not concluded by that determination. In matters of contract especially, the right of citizens of different states to litigate in federal courts of the various states is a right to demand the independent judgments of those courts. The settled law in that respect is well stated in the case of *Burgess vs. Seligman*, 107 U. S., 20, 33."

See also *American and English Encyclopedia of Law*, Volume 27, page 600, and the notes and cases cited in the notes.

Both the Circuit Court and the Circuit Court of Appeals recognized and followed this rule of law, and it seems to us there can be no dispute about the correctness of this proposition.

2

The decisions of the Supreme Court of Ohio, prior to the one announced in *Young vs. The Lion Hardware Company*, in cases involving the same constitutional questions, are certainly in conflict with that opinion, and under the earlier decisions of that Court, we believe that the law now in question is constitutional, and that the decision of *Young vs. The Lion Hardware Company* is a departure from the settled construction as theretofore announced by that Court.

If we are correct in this conclusion, then this is an additional ground why this Court should consider this question independently of the State Court.

*Ohio Life Insurance & Trust Company vs. Debolt*, 16 How., 432.

*Douglass vs. Pike County*, 101 U. S., 677.

It is true that the Supreme Court of Ohio had not passed upon this section of the mechanics' lien law, as it had only been enacted in April, 1894, but they had recognized other laws as being constitutional which we insist were open to the same objection as the act now in question.

The cases of—

*Railway Company vs. Cronan,* 38 O. S. 122 and
*Railway Company vs. McCoy,* 42 O. S. 251,

were actions to enforce liens in favor of those contributing labor or material to the construction of the railway.

In *Railway Company vs. Cronan,* supra, Longworth, Judge, in delivering the opinion of the Court on page 124, says,—

> "The cause of action upon which suit was originally brought was created by the act of March 31, 1874, (71 Ohio Laws, 51), entitled 'an act to secure pay to persons performing labor and furnishing materials in constructing railroads,' and the solution of the question raised in this Court depends upon the proper construction of its terms."

It is true the constitutionality of the enactment was not mooted, although very able and distinguished counsel represented the railroad company which was opposed to the sustaining of the lien.

The same was true in *Railway Company vs. McCoy,* supra.

As well stated by other counsel for Respondents:

> "The power of the legislature to regulate contracts and to point out the mode of their discharge was recognized as early as the case of *Smith vs. Parsons,* 1 Ohio, 236."

Judge Burnet, in delivering the opinion of the Court, on page 239, says,—

> "It is admitted that the states have not given up the entire power of legislating on the subject of contracts.... The legislature has a right by law to regulate contracts, to determine their effect and point out the mode of their discharge. These laws are applied to all subsequent engagements and fix the rights of the parties at the very instant the contract is closed, so that the contract in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it. It continued what it was at its commencement; and it is more correct to say that the law has in part made the contract than that it has changed it."

This language is cited with approval by the Supreme Court in the opinion of the Court delivered by Judge Williams, in *Weil vs. State,* 46 O. S. 450.

It is true that in these cases constitutional questions as affecting mechanics' liens were not raised, but the principle of law relied upon by the petitioner, in this case, as rendering the act under consideration unconstitutional, was certainly passed on in these cases, and adversely to the petitioner, and for this reason this Court is not bound by the decision of the Supreme Court in *Young vs. The Lion Hardware Company.*

3 and 4.

An examination of the decision of the Supreme Court in the case of *Young vs. The Lion Hardware Company,* will disclose that the decision is based upon general constitutional law, and is not applied to any particular or peculiar provision of the Ohio Constitution different from the Constitution of any other state or the United States. It is based upon the broad ground that it abridges the liberty of the citizen, and interferes with his property rights.

Judge Lurton, in delivering the opinion of the Court below, clearly points out this fact, and quotes copiously from the decision of the Ohio Supreme Court to show the correctness of his conclusion. On pp. 376, 377 in his opinion, 86 Fed., he says:—

> "We have made these copious extracts from the opinion for the purpose of indicating that the case did not turn upon any constitutional principle peculiar to Ohio. The 'rights' supposed to be violated are rights deemed fundamental under all forms of popular and constitutional government and like declarations are to be found in all or most of our state Constitutions. The question is, therefore, one of general law, having as much reference to the Constitution of any other state as to that of Ohio."
>
> "In the case of *Whiting vs. Fond du Lac County,* 25 Wis. 188, it was held that under the Constitution of Wisconsin, a tax could not be constitutionally laid in aid of the building of a railroad. The Supreme Court of the United States refused to follow this as a decision obligatory upon it in a case involving the validity of an act of the Wisconsin legislature authorizing a tax in aid of a railroad.
>
> "Upon the question as to whether the decision was one of local or general law the Court, in *Olcott vs. The Supervisors,* 16 Wall, 678, 690, said:

> " 'This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional law. It is a question of general law. It has as much reference to the constitution of any other state as it has to the State of Wisconsin. Its solution must be sought, not in the decisions of any single state tribunal, but in general principles common to all Courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no state can conclusively determine for us. This consideration alone satisfies our minds that *Whiting vs. Fond du Lac County* furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect.' "

The decision of the Court was upon a part of the constitution common to all constitutions, and its decision had reference as much to the constitution of one state as to another state, and attempted to prescribe a rule of general constitutional construction, applicable to the constitution of any other state or even to the Constitution of the United States. This is a question of general jurisprudence, and the Court must decide it independently, and although mechanics' liens are statutory, yet being a part of the statute law of almost every state and territory, and recognized by congress as a part of the statute law of the District of Columbia, the law applicable to them may be considered in the same light as the principle regulating general commercial law, and therefore, in cases of proper jurisdiction, the subject of the independent interpretation and construction of the Federal Courts regardless of local decision, and local decisions are not binding where they affect or construe only the general powers of the legislature over the subject matter, and upon these grounds, this Court should examine this act and reach its own independent conclusion as to its validity, and we insist that any one of the foregoing reasons is sufficient ground for that examination and decision.

Perhaps the latest expression of this court on the question now before us is found in the case of *Board of Comm'rs of Stanly Co. v. Coler & Co.*, 190 U. S., 437. The second syllabus of that case is as follows:

> "Federal courts, in determining the validity, in the hands of bona fide purchasers, of county bonds issued in aid of railroad construction under the authority of N. C. Code, Sections 1996-1999, are not bound by the construction given such statute by a decision of the highest state court subsequent to such purchase, but will exercise an independent judgment as to the meaning."

Quoting from the opinion by Mr. Justice McKenna, the following language is to the point:

> "To this case the respondents oppose the contentions that its (the Supreme Court of North Carolina's) interpretation of the Constitution and Code sections is (1) incorrect, and this involves the further contention that we may exercise an independent judgment of them; * * * Pretermitting consideration of the other conditions for a time, we are brought to the contention of the respondents, that we are not constrained to follow the opinion of the Supreme Court of North Carolina.
>
> "The general rule undoubtedly is that we accept the interpretation put by the state courts upon the state constitutions and statutes. There are exceptions to the rule, and the case at bar presents one of them. The rule and its exceptions are stated in *Burgess v. Seligman*, 107 U.S., 20, 27, L. Ed. 359, 2 Sup. Ct. Rep. 10, and the many cases by which the rule was sustained are collected in a note on page thirty of the opinion. In that case a statute of Missouri provided that the stockholders of a corporation at its dissolution were liable for its debts. It also provided that no person holding stock as executor, etc., or holding stock as collateral security, should be personally liable, but the persons who pledged the stock should be considered as holding the same, and be liable. The Supreme Court of Missouri held that the exemption of the statute did not extend to persons receiving from the corporation itself stock as collateral security. This court decided to the contrary, and held that it was not bound to follow the decision of the Supreme Court of the state. The question presented was regarded as one of commercial law and general jurisprudence, and the right to exercise our own judgment was asserted. It was said that state decisions were to be followed when they had become a rule of

property, and that 'this is specially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued.' "

We desire now to call attention to the act itself, and to the arguments advanced by counsel for the petitioner, and the grounds upon which they claim this law is unconstitutional, as well as the authorities and decisions upholding and enforcing such legislation.

II.

**Was the law in question unconstitutional?**

As we understand the claim of counsel for the petitioner, when reduced to its final analysis, their objection to the law is based upon the following grounds,—

1st. That it deprives the owner of property of the right of acquiring, possessing and protecting his property and contracting in relation thereto.

2nd. It impaires the obligation of contract.

3rd. It deprives the owner of property without due process of law.

4th. It is class legislation.

The first three propositons may be discussed together, as the decisions applicable to each are so closely interwoven, that it is difficult to point out and classify the decisions on each particular subject,

without overlapping into the other, and the same constitutional principle covers all three instances.

The lien asserted and sought to be enforced is for labor and material furnished after the passage of the act of April 13th, '94, and the labor and material were all furnished and the contract completed and the lien recorded and established long prior to the decision of the Supreme Court of Ohio in *Young vs. The Lion Hardware Company* holding the act to be unconstitutional.

The contract having been made, executed and performed, during the time this law stood upon the statute books of the State of Ohio, as the law of Ohio, the law must therefore be considered as forming a part of the contract, and it does not deprive the petitioner of its property, without due process of law, nor does it impair the obligation of its contract.

As is well stated by the Supreme Court of Ohio in *Smith vs. Parsons*, 1 Ohio, supra,—the contract itself receives an impress from the law, and the law has in part made the contract.

Judge Burnet, in delivering the opinion of the Court, says,—

> "These laws are applied to all subsequent engagements, and fix the rights of the parties at the very instant the contract is closed, so that the contract, in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it. It continues what it was at its commencement; and it is more correct to say that the law has in part made the contract, than that it has changed it."

And on page 238, he says,—

> "Although a state legislature can not pass laws impairing contracts, yet they may regulate them, prescribe their form, their effect and the mode of their discharge, *and every contract is supposed to be made with reference to those laws.*"

And on page 239 he clearly points out the reason upon which this principle of law is based.

In *Weil vs. The State*, 46 O. S. 450, Judge Williams in delivering the opinion of the Court, after quoting from the language of Judge Burnet, already pointed out, on page 452 says,—

"Persons contracting after the passage of the statute, could not know the law was one impairing the obligation of contracts in the sense of the constitution, but as an act regulating future contracts and defining their effect."

And on page 453, in quoting from Judge Burnet in the same case, he says,—

"Instead of determining the validity of the statute by reference to the alleged intention of the parties to the contract, we must fix the *legal intent of the parties, as well as the nature and extent of the obligation of the contract by reference to the statute.*" And again,—"Contracts must be expounded according to the law in force at the time they were made; and the parties are as much bound by a provision contained in a law, *as if that provision had been inserted in, and formed part of the contract.*"

In *Smith et al. vs. Newbauer et al.*, 144 Ind., 95, the Court says in the first paragraph of the syllabus,—

"Section 7257 R. S., 1894, providing that a mechanics' lien may be acquired, by filing in the recorder's office a notice of intention to hold the lien, within sixty days after performing labor or furnishing material, is not unconstitutional as depriving the owner of his property without due process of law."

This Court will observe that the law under consideration was very similar to the Ohio law, and it was certainly open to all the objections that can be raised on constitutional grounds against the Ohio law. The same argument was made in that case, as is made by the petitioners in the case at bar. They vigorously asserted that that law prevented the owner from paying cash for his building, or paying for it in advance or paying for it with other property, and made all the other questions that are argued by counsel for the petitioners in the case now before this Court.

Judge Howard, in delivering the opinion of the Court, on page 96, says,—

"In support of the demurrer to the complaint, it is first contended that the mechanics' lien law in this state is invalid, as repugnant to Section 1, Article XIV of the Constitution of the United States, which provides that no state shall deprive any

person of life, liberty or property, without due process of law." * * *

In discussing this question farther on in the opinion, he says,—

"It has often been held that every statute under which a contract is made, enters into and forms a part of such contract. The appellants, in the contract for the erection of the dwelling house upon their property, are therefore chargeable with knowledge of, and are bound by all the provisions of our mechanics' lien laws then in force. By the terms of the agreement entered into, the contractors were to furnish all materials necessary for the construction of the building. This was notice that such materials were to be furnished; and the law, under which the contract was made, was further notice that the building and the ground upon which it was to be erected, would be liable to a lien for the value of the materials so furnished."

On page 98, he says,—

"It is intimated that the law hampers the freedom of action of the property owner; that he may desire to pay the contractor in advance, or to pay him by an exchange of other property for the erection of the building; and that it may be an inconvenience, or induce the contractor to bid higher for the work, if payment is to be delayed for sixty days after the work is done. *These, however, are considerations that should be addressed to the legislature, and not to the courts.* Besides, it is to be remembered that without the right to a lien on the property, laborers and material men would, in many cases, have no security for their toil or the materials furnished by them. The laborer is worthy of his hire, and the seller of goods ought to be paid for them. As the law stands, all parties are secured in their rights. The owner, by seeing that laborers and material men are paid, or by keeping back for sixty days from the contractor, sufficient to make such payment, is in no danger of having to pay twice for his building; while at the same time, the man whose labor and material has gone into the building, can look to the building itself, and to the ground upon which it stands, for his security. The property owner enjoys the benefit of this work and of this material, and it is but just that he should be charged, for at least sixty days, with the responsibility of seeing that they are paid for."

In this case, there was a petition for a rehearing, and after a careful and full consideration, the original decision of the Court was sustained and upheld.

Judge Howard, in delivering the opinion of the Court, on the petition for rehearing, on page 102, says,—

> "We were of opinion that the validity of the mechanics' lien law of this state was fully considered and affirmed in the original opinion. That law does not provide for depriving an owner of his property without his consent. On the contrary, the law which enters into and forms a part of his building contract, is notice to him that his land, and the building to be erected thereon, are liable to a lien for the value of the labor and materials which may enter into its construction. He voluntarily contracts for this labor and material with notice from the statute of the inchoate lien thereby authorized. The statute, moreover, in the interest of the owner prevents the fixing of the lien unless notice be given him within sixty days from the time of the furnishing of the labor and material. His property is therefore not taken without due process of law. See *Colter vs. Frese*, 45 Ind., 96."

The provision for obtaining the lien under the Indiana statute was the same as that in the Ohio statute, to-wit, by filing a sworn statement with the recorder, setting out the labor and material as required by the statute, the only difference being that in Ohio, he had 120 days to do this, while in Indiana he had 60.

Judge Howard, in this opinion, on pages 102-3, cites Section 33-a of Phillips on Mechanics' Liens (3d Ed.), with approval. It is there held that the owner may by contract or indemnity bond, protect himself against double payment for such labor and material.

Citing,—

> *Mallory vs. LaCrosse Abbatoir Co.*, 80 Wis. 170, and also distinguishes the case of *Sprey Lumber Company vs. Savings Bank Company*, 77 Mich., 199.

At the bottom of page 103 he says,—

> "The statute in the case at bar, however, is one with reference to which appellants entered into their building contract, and according to which they consented to the lien that followed. Such consent included an agreement that those who should furnish to the contractors and subcontractors, the material which should go into the building, might have sixty days after furnishing the same, within which to give notice of their

intention to hold such lien. We have no doubt of the constitutionality of the law."

In *Colter vs. Frese*, 45 Ind. 96, cited by Judge Howard in the opinion above quoted, the validity of an act such as the one now in question, was ably sustained and upheld by Judge Warren, who delivered the unanimous opinion of the Court.

The opinion of the Circuit Court of Appeals, as delivered by Judge Lurton, reported in 86 Fed. 370, contains such a full, complete and exhaustive discussion of this whole question, that it hardly seems necessary to cite further authority on this subject. We have endeavored, however, to call attention to a few recent decisions that were not mentioned in that opinion, some of which have been made since this case was decided in the Court below.

In *Title Guarantee & Trust Company vs. Wrenn*, 56 Pac. Rep. 271, the Supreme Court of Oregon say in the first paragraph of the syllabus,—

> "Code Section 3672, providing that where improvements are constructed on lands with the owner's knowledge, the interest of the owner shall be subject to lien unless within three days after notice of the construction he gives notice, in writing, posted on the land, that he will not be responsible for the improvement, is not unconstitutional, on the ground that it permits a lien to attach without the consent of the owner, since it only prescribed what shall be evidence of the owner's consent."

The provision of the Oregon statute was challenged in that case, on the ground that it was unconstitutional, because it permitted the contractor or subcontractor to obtain a lien without the authority or consent of the owner.

The Court say in delivering the opinion,—

> "Similar provisions of mechanics' lien laws have been sustained and enforced even in the state to whose reports we are referred for counsel's leading authority. See
>
> *Wheaton vs. Berg*, 50 Minn., 525.
> *Lumber Company vs. Newkirk*, 80 Cal. 275
>
> " * * * So that we conclude this section is not open to the constitutional objection urged."

In *Albright vs. Smith et al.*, 3 S. Dak. 631, the Court say in the syllabus,—

"By Section 5470 Comp. Laws, a subcontractor is entitled to a lien as defined in the preceding section, for labor done or material furnished, if within sixty days after the doing of the labor or the furnishing of material he files with the clerk of the Circuit Court of the proper county or subdivision the account of the demand due him as therein provided."

"2. Such lien within the limit of the contract price between owner and contractor, may be enforced irrespective of the state of the account between the owner and the contractor, or the amount due or unpaid upon such contract."

"3. So construed, said Section 5470 is not unconstitutional, as impairing the obligation of the contract between the owner and the contractor."

Kellam, Judge, in delivering the opinion of the Court on page 632 says,—

"The former opinion of this Court may be found in 2 S. D. 577, where the questions then considered as controlling in the case, were discussed at length."

Upon referring to that decision this Court will find that that Court say in the syllabus,—

"1. A subcontractor who furnishes materials, lumber or labor, not to the owner, but to the contractor for the erection of a new building, can, under the provisions of Section 5469, 5470 Comp. Laws, acquire and enforce a lien on the building, and on the interest of the owner of the real estate on which the building stands, to the extent of the value or the price agreed to be paid by the contractor for the material, lumber or labor furnished.

"3. If a subcontractor files his claim within sixty days after he has furnished the material or performed the labor, he is entitled to his lien without any further notice than such filing may give the owner.

"4. It is not the contract between the original contractor and the owner which supports the lien under the statute, but it is the use of the material and work upon the premises—the putting of them into the building and attaching them to the freehold, whereby the owner is benefited by them, which entitles the party furnishing them to a lien to the extent of their value."

Bennett, Judge. in delivering the opinion of the Court, after discussing the facts in the case and making the statement that the question was before that Court on questions of law only, on page 583 says,—

"A large number of assignmens of error was made, but the questions involved in the bill and arising on the errors assigned, were as follows,— . . .

"2. Are Sections 5469, 5470 Comp. Laws constitutional, when construed to allow subcontractors a lien by simply showing a compliance therewith by filing a claim for a lien with the clerk of the Court within sixty days after the last material was furnished, and without presenting or serving the owner with a statement or copy thereof within thirty days after the last of such materials were sold and furnished?....This action is based upon the following section of our code, relating to mechanics' liens: 'Section 5469. Every mechanic or other person who shall do any labor upon, or furnish any material, machinery or fixtures for any building, erection or other improvements by virtue of any contract with the owner, his agent, trustee, contractor or subcontractor, upon complying with the provisions of this chapter, shall have for his labor done or material, machinery or fixtures furnished, a lien upon such building, erection or improvement, and upon the land belonging to the owner on which the same is situated, to secure the payment of such labor done, or material, machinery or fixtures furnished.' * * *

" 'Section 5470. Every subcontractor, wishing to avail himself of the benefits of this chapter, shall within sixty days after the material shall have been furnished, or labor performed, file with the clerk of the District Court of the county, or the judicial subdivision in which the building, erection or other improvements to be charged with the lien is situated, a just and true account of the demand due him, after allowing all credits, and containing a correct description of the property to be charged with said lien, and verified by affidavit; but a failure to file the same within the time aforesaid shall not defeat the lien, except as against purchasers or incumbrancers in good faith and without notice, whose right accrued after sixty days, and before any claim for the lien was filed, or against the owners, except the amount due the contractor at the time of filing the same.' "

It was claimed in this case, as in the case at bar, that this statute deprived the owner of his property without due process of law, and impaired the obligation of the contract, and for that reason was unconstitutional.

Judge Bennett, on page 587 of the opinion, says,—

"The appelant further contends that if the lien law should be so construed as to give a lien to the respondents, without giving the owner notice, it impairs the obligation of the original contract and operates to effect the taking of appellant's property without due process of law, and is void because unconstitutional. * * * In answer to this, we would say that the liability of the owner of the building, which is being erected or repaired, to pay a subcontractor for labor performed or materials furnished, is not placed on the ground of the contract made with the owner by the person performing the labor or furnishing the material, because usually there is no such contract between them, but upon the ground that as the labor and material contributed to the erection or reparation of the building of which the owner receives the benefit, the law imposes upon him the responsibility for sixty days, at least, of seeing that the claims are paid. * * * It prevents the owners of real estate from securing to themselves, without compensation, the benefits of the labor and materials of others, by means of low contracts with irresponsible or perhaps dishonest contractors. Were it otherwise, however, and the lien operated directly upon the contract, it could not have the effect contended for by the appellant.

"When a contract is entered into by the parties, it is not the contract which creates the lien under the statute, but it is the use of the materials and work upon the premises, the putting of them into the building, and attaching them to the free-hold, which entitles the party furnishing them to a lien to the extent of their value. Further, it is a well known and elementary principle that contracts must be expounded according to the law in force at the time they were made. The law under which a contract is made is a part of the contract, as much as though it were incorporated into it. When appellant contracted with defendants, Smith Brothers, whereby he contracted to pay them for the erection of the building, as it progressed, and did so, it was at his risk; for the law, which was a part of the contract, said. 'If there are subcontractors who have furnished material and performed work for this contractor, they shall have their full pay; if the contractor does not pay them, the owner of the

building must pay them; if he does not, they shall have a lien upon the building for sixty days at least to enforce their payment.' The inconveniences of the law do not seem to us to be insuperable. They are based upon the real or supposed hardship that in many instances it subjects the owner to the liability of making double payments for the same work or material, and prevents him from making contracts for the erection of buildings and the furnishing of materials to be paid for otherwise than in money, and many other similar inconveniences. These might have much force if addressed to the legislature, the law-making power, and we may have very serious doubts as to the policy or the necessity of such a law, and we can, with propriety, recommend to the legislature that it would be wise and beneficial that it should be changed in this particular, yet these considerations can not have much weight against the clear and unequivocal terms of the statute. Still, if these inconveniences exist, they can always be provided against at the time the contract is made. The owner can protect himself by a bond or other security, or may make such a contract as will allow him to withhold from the contractor for a period of sixty days after the completion of the work, enough to protect the property from liens for work or material performed or furnished by persons other than the original contractor. There are many other states whose mechanics' lien laws are similar in their main features to ours, and many of them have been construed by the Supreme Courts of those states, and those decisions are in harmony with the conclusions herein enunciated."

Citing,—

*Gardner vs. Leck*, 48 N. W. 1120;
*Donahy vs. Clapp*, 12 Cush. 440;
*Parker vs. Bell*, 7 Gray 429,

and many other cases.

In the case of *Gardner vs. Leck*, supra, the Court, in answer to the argument that such a lien law amounts to the taking of property without due process of law, and interferes with the owner's right and freedom of contract, says,—

"This question is not a new one, but has been frequently raised and met in the case of lien laws in various states which contain the same general features, and while the policy of such laws has been often questioned, yet so far as we have discovered, they have always been upheld as valid. * * *

That while no man can be deprived of his property without his consent, and while the basis of a right to a lien against property is the consent of the owner, yet the contract of the owner with the contractor, made under and subject to the provisions of an existing lien law, is evidence of the authority of the latter to charge the property with the liabilities incurred by him in performing his contract, and operates by virtue of the statute as authority to do so."

The same principle is recognized and upheld in *Donahy vs. Clapp*, supra, where Chief Justice Shaw says—

"Such a contract, by force of the existing law when it was made, of which the owner is presumed to be cognizant, gives his irrevocable power to his contractor to charge and bind his estate, and when such power is executed by the actual making of such contract, it is in law the act of the owner, hypothecating his own estate to the extent of the price of such labor."

As is well stated by the Supreme Court of Minnesota, above referred to, the question now before this Court is not a new one, and the mechanics' lien law of Ohio which is attacked in this case, contains the same general features of the laws of the various states of the Union, which have been almost universally upheld, there being, as stated by Judge Lurton, in the opinion below, but two well defined exceptions to this rule—those in the states of Michigan and Pennsylvania, and as already pointed out by the Supreme Court of Indiana, the Michigan law can be distinguished from our case, and as stated by Judge Lurton, in the opinion below (see 86 Fed. pp. 378 and 379,—

"The Ohio act involved here, contains no provision *expressly prohibiting an agreement limiting the supposed agency of the contractor for the owner*, or restraining him from creating any lien, such as was contained in both the Michigan and Pennsylvania statutes. If such acts are properly to be regarded as constituting the contractor a special agent for the owner, to which he consents by making a contract with the law before him, it would seem that the Ohio act would be valid, there being no inhibition of an agreement withholding such power, and no intimation that the hotel company, in this instance, limited the implied agency of the contractor. Certainly the Pennsyl-

vania decisions give no support to the decision of the Ohio court that the Ohio act is void. Under the settled line of decisions in Pennsylvania the Ohio act is valid. In the last Pennsylvania case, that of *Waters vs. Wolf*, cited above, the Court announces its adherence to the long line of decisions upholding just such a statute as the Ohio act involved here, saying,—'In the absence of an express contract against liens, with a statute before him giving a lien to those with whom he contracted, the consent of the owner that a remedy be given by law should be enforced under the contract, was certainly to be implied.'

"In all, or nearly all of the states there are statutes intended to give liens to those who contribute labor or materials to the enhancement or improvement of the land or buildings of an owner."

In application of what is here said we desire to call especial attention to the decision of Chief Justice Gibson in *White vs. Miller*, 18 Pa. 52, the opinion beginning on page 53, where he says,—

"As soon as owners of lots ceased to be their own builders, they put it in the power of the persons employed by them to occasion losses to mechanics and material men which they ought not to bear; and it was to remedy this mischief that the legislature established the principle that materials and labor are to be considered as having been furnished on the credit of the building, and not of the contractor. The principle is not only a just but a convenient one. Whether the builder be the agent of the owner, or an independent contractor, his appointment to the job creates a confidence in him which was not had before, and the consequences of a false confidence ought not to be borne by those who had no hand in occasioning it. Nor does the rule of the legislature bear hard on the owner. He has it in his power to detain the price of the building while there are outstanding charges against it or to stipulate for security against those that might afterwards turn up; and if he use common prudence, any loss which occurs will eventually fall on the author of it. If he do not, he can not charge the mechanic or material men with the consequence of his own supineness."

See also,—

*Taylor vs. Murphy*, 148 Pa. 337.

The following decisions have upheld the constitutionality of similar laws to the one now under consideration:

In New York,—

*Blauvelt vs. Woodworth*, 31 N. Y. 285.
*Glacius vs. Black*, 67 N. Y. 563.

In Minnesota,—

*O'Neil vs. St. Olaf's School*, 26 Minn. 329.
*Bohn vs. McCarthy*, 29 Minn. 23
*Laird vs. Moona*, 32 Minn. 358.
*Gardner vs. Leck*, 46 Minn. 285.

In Maine,—

*Spofford vs. True*, 33 Me. 283.
*Taggard vs. Buckmore*, 42 Me. 77.

In Wisconsin,—

*Mallory vs. LaCrosse Abattoir Co.*, 80 Wis. 170.

In Missouri,—

*Henry & Coatsworth Company vs. Evans*, 97 Mo. 47.

In Massachusetts,—

*Parker vs. Bell*, 7 Gray 420.
*Donahy vs. Clapp*, 12 Cush. 440.
*Bowen vs. Phinney*, 162 Mass. 593.

In Tennessee,—

*Cole Manufacturing Co. vs. Falls*, 90 Tenn. 471, and cases there cited.

In California,—

*Hicks vs. Murray*, 43 Cal. 515.

In Rhode Island,—

*Gurney vs. Walsham*, 16. R. I. 699.

In Virginia,—

*Roanoke etc. Co. vs. Karn*, 80 Va. 589.
*N. & W. Ry. Co. vs. Howison*, 81 Va. 125.

In Washington,—

*Spokane Co. vs. McChesney*, 1 Wash. Rep. 609.

In Connecticut,—

*Payne vs. Tillinghort*, 52 Conn. 632.

In Maryland,—

*Frensch vs. Shyrock*, 51 Md. 162.

These authorities were all examined and cited in the opinion of the Court of Appeals below.

Judge Lurton, in this opinion (see decision 86 Fed. 379), says,—

> "In a large number of cases, the question of the constitutionality of acts extending the lien to subcontractors and others having no direct contractural relation with the owner has been brought in question, and the validity of the legislation upheld. In still other instances, such acts have been enforced without question as to their constitutionality. We cite a number of cases, though by no means all, in which acts involving questions identical with those raised by the Ohio statute have been enforced either after their validity had been challenged or *sub silentio*."

And after citing decisions from the courts of last resort of very many of the states on this question, on page 383 of the decision, he says,—

> "The direct question as to the constitutionality of acts extending a lien to subcontractors and material men furnishing materials at the instance of contractors, has not arisen in the Supreme Court of the United States, nor in any of the United States Courts of Appeals, so far as we have been able to discover."

He then calls attention to the act of congress, passed March 2, 1833, 4 Statute at Large, 695, giving a lien in the District of Columbia upon buildings to all persons who did work or furnished materials on an order of the contractor, and the decision of this Court in the case of *Winder vs. Caldwell*, 14 How. 434, in which case a subcontractor's lien was upheld and protected although the constitutionality of the enactment was not raised. In that case Justice Greer, in speaking for the Court, said,—

"The aim and policy of this act is also obvious. Experience has shown that mechanics and tradesmen who furnish labor and material for the construction of buildings are often defrauded by insolvent owners and dishonest contractors. Many build houses on speculation, and after the labor of the mechanics and materials are incorporated in them, the owner becomes insolvent, and sells the buildings or incumbers them with liens; and thus one portion of his creditors are paid at the expense of the labor and property of others. Or, the insolvent owner, who builds by the agency of the contractor or middleman, pays his price and receives his building, without troubling himself to inquire what has been the fate of those whose labor or means have constructed it. These evils required a remedy, and such a one as is given by this act. Its object is not to secure contractors who can take care of themselves, but those who may suffer loss by confiding in them. It is not the merit of the contractor that gave rise to the system, but the protection of those who might be wronged by him, if the owner were not compelled thus to take care of their interests before he pays away the price stipulated."

Judge Lurton, in discussing this feature of the case on pages 383 and 384 of his opinion, says,—

"In *Grant vs. Strong*, 18 Wall., 623, and *McMurray vs. Brown*, 91 U. S. 258, and *Van Stone vs. Stillwell & Bierce Manufacturing Co.*, 142 U. S. 128, the question of waiver of the lien given under various state statutes, was considered. In considering the character and nature of the lien the Court, in *McMurray vs. Brown*, 91 U. S. 258-266, said,—

" 'Liens of the kind, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed, or the promised materials are furnished; the principle being, that the parties are supposed to contract on the basis that, if the stipulated labor is performed or the promised materials are furnished, the laborer or material man is entitled to the lien which the law affords, provided he gives the required notice within the specified time.'

"In *Van Stone vs. Stillwell & Bierce Manf'g Co.*, 142 U. S. 128-136, it was said,—

" '*It is not the contract for erecting or repairing the building which creates the lien, but it is the use of the materials furnished and the work and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives*

*the material man and laborer his lien under the statute.* The lien is brought into operation by virtue of the statute, and the contract for building is entered into presumably in view of or with reference to, the statute.'

"In *Central Trust Company vs. London,* 31 U. S. A., pp. 387-422, a lien in favor of subcontractors was enforced against mortgagees by this Court. Judge Taft, in delivering the opinion of the Court, touching the character of the lien, said,—

" 'A subcontractor's lien under the statute is not dependent on the principal contractor's having perfected his lien. *Green vs. Williams,* 8 Pickle (Tenn.) 220. It is independent of, and superior to, his lien, and is only limited by the amount due to the principal contractor at the time of the service of notice by the subcontractor on the railroad company. Therefore, the assignee of a principal contractor's lien is junior to the subcontractor who has perfected his statutory lien.'

"In *Central Trust Company vs. Richmond, etc., R. Co.,* 31 U. S. A., pp. 675-688, we enforced a lien in favor of such subcontractors arising under a Kentucky statute. Touching the origin and nature of the lien, we said,—

" 'It is not a lien originating in a contract for a lien, but arises out of the statute independent of any agreement for a lien, and is based upon the equity of paying for work done or materials delivered.' * * *

" 'The clear purpose of the Kentucky statute was to make the liens of the contractor and subcontractor independent, direct liens, the latter limited only by the amount of the original contract price. The lien of the subcontractors does not spring out of the lien of the contractor, and is not derived therefrom or subordinate thereto. The aggregate of all liens is not to exceed the contract price agreed to be paid by the owner, but this limitation concerns not the fact of a lien, but the extent thereof. Being a direct lien, its existence does not depend upon the existence or non-existence of a contractor's lien, and the waiver of a lien by a contractor, will not affect the subcontractor's lien.' "

Before passing from the cases decided by the Supreme Court of the United States, in which a lien law was recognized and enforced, although the question as to the constitutionality of the laws was not raised, and where, as stated by Judge Lurton, the Court sustained such laws *sub silento,* we desire to call attention to the very recent

decision of this Court, in the case of *Springer Land Association vs. Ford,* 168 U. S. 513, where the mechanics' lien law of New Mexico was upheld and enforced.

On page 521 of this report, the provisions of the New Mexico statute then under consideration, are set out in full. We quote from these pages as follows,—

> "Section 1519. A lien is a charge imposed upon specific property by which it is made security for the performance of an act.
>
> "Section 1520. Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road or aqueduct to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for work or labor done or materials furnished by each respectively, whether done or furnished at the expense of the owner of the building or other improvement, or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of any mining or of the construction, alteration or repair, either in whole or in part of any building or other improvement as aforesaid, shall be held to be the agent of the owner for the purposes of this act."

The other sections of the statute are set out, but we have quoted sufficient to show that the New Mexico law is almost identical with the section of the statutes of Ohio now under consideration.

The law of New Mexico, quoted above, is open to all the objections that can be made to the Ohio law. It is true a constitutional question was not raised in that case, but if the law was void, the lien could not be upheld.

We call especial attention to the syllabus of the case, and the opinion delivered by Chief Justice Fuller on page 524.

This Court, in *Van Stone vs. Stillwell & Bierce Manuf'g Co.,* 142 U. S., 128-136, has recognized the same principle of law set forth in the numerous decisions, sustaining sub-contractors and material men's liens, and in answer to the argument that it takes the owner's property without his knowledge or consent, and deprives him of his

property without due process of law, and interferes with his freedom to contract, it is there stated by Justice Lamar on page 136:

> *"It is not the contract for erecting or repairing the building which creates the lien, but it is the use of the material furnished, and the work and labor expended by the contractors, whereby the building becomes a part of the freehold that gives the material man and laborer his lien under the statute.* The lien is brought into operation by virtue of the statute, and the contract for building is entered into *presumably in view of*, or with reference to, the statute."

The cases sustaining mechanics' lien laws, such as the one now before this Court, proceed upon this theory, and we insist that it is the correct one. The following are a few of the principal cases upholding this doctrine:

> *Cole Mfg. Co. vs. Falls*, 90 Tenn., 466.
> *Henry & Coatsworth Co. vs. Evans*, 97 Mo., 47.
> *Mallory vs. LaCrosse Abattoir Co.*, 80 Wis., 170.
> *Smith et al. vs. Newbauer*, 144 Ind., 95.
> *Albright vs. Smith*, 2 S. D., 577.

The argument that the act in effect deprives the owner of his property without due process of law, and impairs the obligation of contract, is so clearly answered by Judge Lurton in the opinion of the Court below on pages 387 and 388 of the 86th Fed. Rep., that we wish to repeat what is there said.

He says,—

> "Such statutes rest upon the principle of natural justice, which lies at the foundation of the many liens or preferences among creditors which we have cited from both the common and civil law. It is true that a lien is created in favor of one with whom the owner has no direct contractual relations. But if the owner makes the contract with the law before him, the law enters into and becomes a part of the contract. The legal effect of the contract is to give a lien to all who at the instance of his contractor shall be employed to furnish labor or materials for the work which he has let out. So far as such a statute is limited to future contracts, it cannot be said to impair the obligation of a contract.

"If the law be subject to no other objections, it impairs no contract, for all thereafter made are entered into upon the basis of the law. 'The inhibition of the constitution is wholly prospective. The states may legislate as to contracts thereafter made as they see fit. It is only those in existence when the hostile law is passed that are protected from its effect.'

*Edwards vs. Kearzy*, 96 U. S., 595.
*Greenwood vs. Freight Co.*, 105 U. S., 13.
*Denny vs. Bennett*, 128 U. S., 489
*Smith vs Parsons*, 1 Ohio, 236.
*Weil vs. State*, 46 O. S., 450.

"Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is, and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law."

*"Provident Institution vs. Jersey City*, 113 U. S., 506-514."

See also,—

*New York vs. Squire*, 145 U. S., 175.

The reasoning we insist is sound, and the policy of the rule a wise one.

If the weight of authority is to be found on the side where there is arrayed the greatest number of decisions on the point in dispute, then this lien law in question stands supported by an almost unbroken line of authorities. Ohio stands outside of the line and nearly alone.

It is claimed by the other side that Ohio has good company in the companionship of Alabama, Michigan, Missouri and Pennsylvania, as witness the *Stoddart* case, 116 Ala., 251; the *Spry Lumber Co.* case, 77 Mich., 199; the *Henry* case, 18 Mo. App., 497, and the *Waters* case, 162 Pa. St., 153; but a brief reference to these cases will dispel the illusion that Ohio has all of these states with it on the proposition before us.

The Henry case in 18 Mo. App., has been overruled by the Supreme Court of Missouri in the case of *Henry & Coatesworth Co. v. Evans*, 97 Mo., 47.

In the *Spry Lumber Co.* case, 77 Mich., 199, the court had before it a mechanics' lien statute of Michigan which gave the sub-contractor or material man a lien regardless of the contract between the owner and principal contractor, and unlimited thereby, and declared it unconstitutional. Such a statute would allow a sub-contractor or material man to secure a lien for an unlimited amount on the owner's property for the price of a brick or stone structure, even though his contract with his principal contractor called for a frame building at a specified figure. This statute upon every principle of right, reason and sense should fall.

But note the case of *Smalley vs. Gearing*, 121 Mich., 190, where the Supreme Court of Michigan pronounced valid and constitutional a statute of that state every whit as broad in its provisions, which are here assailed, as the Ohio Statute in question. We quote copiously from that report as follows:

> "1. It is contended by the property owners that the act of 1891, as amended by the act of 1893, is unconstitutional, because it is an unwarrantable abridgement of the freedom of contract, and because it undertakes to give special and unreasonable privileges to one class of citizens at the expense of another. The amendatory act of 1893 amends sections 1, 6, and 9 of the act of 1891. Section 1, as amended, provides substantially:
>
> " 'Every person who shall, as sub-contractor, laborer, or material man, perform any labor or furnish materials to such original or principal contractor, or any sub-contractor in carrying forward or completing any such contract shall have a lien therefor upon such house * * * to the extent of the right, title, and interest of such owner. * * * *Provided*, that any person * * * furnishing material or performing labor of any kind entering into the construction of such building * * * shall, within ten days after furnishing the first of such material or performing the first of such labor to any contractor or sub-contractor, serve on the owner * * * a notice which shall be such as will inform the owner * * * of the nature of the materials furnished or to be furnished or labor performed or to be performed, and a description of the

premises where furnished. * * * Such notices, however, shall be sufficient if served at any time subsequent to said ten days, but before the original contractor shall make out and give to the owner * * * a statement under oath of the number and names of every sub-contractor or laborer in his employ, and of every person, * * * furnishing materials, giving the amount, if anything, which is due or to become due to them, or any of them, for work done or materials furnished, as required by section four of this act. The owner * * * shall not be liable to the sub-contractor, material men, or laborers for any greater amount than he contracted to pay the original contractor; * * * but the risk of all payments made to the original contractor after he shall have received the notice above mentioned, or before the contractor shall have furnished him with a statement as hereinbefore provided, shall be upon the owner * * * until the expiration of sixty days within which claims for liens may be filed, as hereinafter provided, and no payment made to any contractor before the expiration of said sixty days shall defeat any lien of any sub-contractor, material man, or laborer, unless such payment has been distributed among the sub-contractors, material men, or laborers, or, if distributed in part only, then to the extent of such distributions.'

"Section 4 of the act of 1891, which was not amended by the act of 1893, provides:

" 'The owner * * * may at any time retain from any moneys due or to become due to the original contractor an amount sufficient to pay all demands owing or unpaid to any sub-contractor, material man, or laborer who has filed and served the notice in the manner and form as provided in section one of this act. The original contractor shall, whenever any payment of money shall become due from the owner, * * * or whenever he desires to draw money from the owner * * * make out and give to the owner * * * a statement under oath of the number and names of every sub-contractor or laborer in his employ, and of every person furnishing materials, giving the amount, if anything, which is due or to become due to them, or any of them, for work done or materials furnished; and the owner * * * may retain out of any money then due or to become due to the contractor an amount sufficient to pay all demands that are due or to become due to such sub-contractors, laborers, and material men, as shown by the contractor's statement, and pay the same to them, according to their respective rights; and all payments so made shall, as between such owner

* * * and such contractor, be considered the same as if paid to such original contractor. Until the statement provided for in this section is made, in manner and form as herein provided, the contractor shall have no right of action or lien against the owner * * * on account of such contract; and any payments made by the owner * * * before such statement is made, or without retaining sufficient money, if that amount be due or is to become due, to pay the sub-contractors, laborers, or material men as shown by the statement, shall be considered illegal, and made in violation of the rights of the persons intended to be benefited by this act, and the rights of such sub-contractors, laborers, and material men to a lien shall not be affected thereby.'

"The argument against the constitutionality of the act is that, by the amendment of 1893, the owner is prohibited from paying according to the terms of his contract, and the contractor is prevented from obtaining his pay, whenever it appears from the sworn statement that there are bills outstanding in favor of sub-contractors, laborers, or material men; and this, although no person to whom a bill is owing has notified the owner that he proposes to claim a lien. It is insisted that this provision of the law, if enforced, will utterly destroy the system of credit as applied to the building business; that every contractor must pay cash or go out of business; that, no matter how good his credit, or how willing those who supply him may be to trust him, he cannot take advantage of it, because the law forbids; that that flexibility of contract, varying according to circumstances, which is the life of commerce, will be destroyed, and no contract can be safely carried out which does not follow the narrow, rigid lines prescribed by the statute. Counsel cite the case of *John Spry Lumber Co. v. Sault Savings Bank, Loan and Trust Co.*, 77 Mich., 199 (6 L. R. A., 204; 18 Am. St. Rep., 396), as sustaining their contention.

"Act No. 270, Pub. Acts, 1887 (3 How. Stat., Sec. 8398*a* et seq.), was there under consideration. Section 2 of that act provided:

" 'Such lien shall not be defeated by any contract, agreement, or understanding between the owner, part owner, or lessee of the real estate upon which such improvements are made, or for which such materials are furnished, and the original or any sub-contractor, or by any payment made by such owner, part owner, or lessee to such contractor or sub-contractor for the contract price of such labor or material (materials), or any part thereof,

in case the person performing such labor, or furnishing such material, shall comply with the provisions of this act.'

"It was said:

" 'This law makes the mere fact that a building contract exists, or has existed, a sufficient reason for binding the land for any act or omission of the building contractor or his sub-contractor, whether within the range of the contract or not, or whether or not in harmony with its terms. * * * It strikes at the foundations of all property in land. * * * The original contract plays no part in the matter, except as a fact which binds no one, and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer.'

"That statute was very unlike the present. The present act provides, by section 1 (Act No. 199, Pub. Acts 1893), as well as by the same section amended in 1897 (Act No. 143, Pub. Acts, 1897), that:

" 'The owner * * * shall not be liable to the sub-contractor, material men, or laborers for any greater amount than he contracted to pay the original contractor, and shall be entitled to recoup any damages which he may sustain by reason of any failure or omission in the performance of such contract.'

"In this respect the act differs from the act of 1887. By this provision the owner is fully protected upon any breach of the contract. As to the matter of payments, that section provides:

" 'The risk of all payments made to the original contractor after he shall have received the notice above mentioned, or before the contractor shall have furnished him with a statement as hereinbefore provided, shall be upon the owner * * * until the expiration of sixty days within which claims for lien may be filed, as hereinafter provided, and no payment made, to any contractor before the expiration of said sixty days shall defeat any lien of any sub-contractor, material man, or laborer, unless such payment has been distributed among the sub-contractors, material men, or laborers, or, if distributed in part only, then to the extent of such distribution.'

"This provision points out the way in which the owner may safely make payments; that is, he need incur no risk: *First*, if he refuses payment until he is provided with a sworn statement of the contractor, and complies with it; *second*, if the money paid is distributed, in accordance with the statute, among those who might acquire liens, even though he makes payments

without the sworn statement. The owner is not required to make payments beyond the amount called for in the contract. It will be seen, therefore, that he is fully protected if he follows the requirements of the statute. It is true that the original contractor may not be able at all times to get the moneys into his own hands from the owner as rapidly as the contract calls for—that is, his sworn statement may show that there is an indebtedness to sub-contractors, material men, and laborers, and these moneys the owner may withhold, and pay directly to those persons. But the contract must be presumed to have been made in view of these provisions of the statute. *Warren v. Sohn*, 112 Ind., 213; *Provident Inst. for Savings v. Mayer, etc., of Jersey City*, 113 U. S., 506; *Reynolds v. Black*, 91 Iowa, 1. The statute was intended to protect sub-contractors, material men, and laborers, and its benefits should not be frittered away by construction, unless clearly unconstitutional. It does not impair the obligations of contracts, but provides a method for securing payment to those whose labor or material goes into the building, and at the same time protects the owner and contractor, if the provisions of the act are complied with. The doctrine upon which such liens are founded is the consideration of natural justice that the party who has enhanced the value of property by incorporating therein his labor or materials shall have a preferred claim, in a certain sense, on such property, for the value of his labor or materials.

The specifications of the contract between Schmidt and Gearing contain this provision:

"'The building or works must be delivered up free of all mechanics' liens or other claims chargeable to the contractor.'

"It is the contention of the owners of the property that this provision prevents any of the lien claimants in this cause from obtaining a lien. This contention cannot be sustained. The contract was made in reference to the lien statute, which expressly confers upon material men and laborers the right to assert liens. In *Whittier v. Wilbur*, 48 Cal., 175, a like question was presented under a somewhat similar contract. It was said:

"'The contractor and owner cannot deprive the material man of his lien by introducing a stipulation into the building contract by which the contractor agrees to indemnify the owner

against any lien by persons furnishing materials to be used in the construction of the building.'

See, also,—

*Boisot, Mech. Liens,* 225 and 227."

Such is the latest declaration by the Supreme Court of Michigan on the validity of the mechanics' lien law. In this decision is met and answered all the arguments that are, and can be put forth against the lien law of Ohio. Small comfort can be found by the petitioner in the State of Michigan in the light of this decision. It deprives the other side of all right to claim that Michigan should be catalogued with Ohio in the line of decisions condemning the latter's lien statute in question.

As to Pennsylvania it is only necessary to refer to the decision by Lurton, J., at page 378, 86 Fed., where he concludes as follows:

> "In the last Pennsylvania case, that of *Waters vs. Wolf*, cited above, the court announces its adherence to the long line of decisions upholding just such a statute as the Ohio act involved here."

And so it did, but it condemned the act then before it because, like the statute of Michigan, construed in the Spry Lumber Co. case, 77 Michigan, *supra,* it allowed a lien for an unlimited amount.

We are forced to admit that the Stoddart case in Alabama leaves the decision in that state as a companion-piece with the decision in Ohio.

Besides finding approval in later decisions of the Federal courts, the decision by Lurton, J., of this case in the court below, has been followed, and the reasoning adopted, by the Supreme Courts of Kentucky and Louisiana. The statute of Kentucky was as follows:

> Section 2463: "A person who performs labor or furnishes materials in the erection, altering or repairing a house, building or other structure, or for any fixture or machinery therein, or for the excavation of cellars, cisterns, vaults, wells, or the improvement in any manner of real estate, by contract with or by

the written consent of the owner, contractor, subcontractor, architect or authorized agent, shall have a lien thereon, and upon the land upon which said improvement shall have been made, or on any interest such owner has in the same, to secure the amount thereof with costs; and said lien on the land or improvements shall be superior to any mortgage or incumbrance created subsequent to the beginning of the labor or the furnishing of material; and said lien, if asserted as hereinafter provided shall relate back and take effect from the time of the commencement of the labor or the furnishing of the materials: Provided, that such lien shall not take precedence of a mortgage or other contract lien or bona fide conveyance for value without notice, duly recorded or lodged for record according to law unless the person claiming such prior lien shall, before the recording of such mortgage or other contract lien or conveyance have filed in the clerk's office of the county wherein he shall have performed labor or furnished materials as aforesaid, a statement showing that he has performed or furnished, or that he expects to perform or furnish, such labor or materials and the amount in full thereof, and his lien shall not, as against the holder of said mortgage or other contract lien or conveyance, exceed the amount of the lien claimed, or expected to be claimed, as set forth in such contract. * * * The liens provided for herein shall in no case be for a greater amount in the aggregate than the contract price of the original contractor; and should the aggregate amount of the liens exceed the price agreed upon between the original contractor and the owner, then there shall be a pro rata distribution of the original contract price between said lien holders."

Discussing the constitutionality of the above statute in the case of *Hightower vs. Bailey*, 22 Kentucky Law Reporter, 88, 90, (1900) 56 S. W. 147, 49 L. R. A. 255, Chief Justice Hazelrigg said:

"This contention (that the statute violates the obligation of contract) is not without authority to support it. The Ohio courts seem to so hold, and perhaps also the courts of Michigan. But the weight of authority seems to be the other way.

* * * * * * * * *

"An elaborate and learned discussion of this question is found in *Jones vs. Great Southern Fireproof Hotel Company*, 86 Fed. Rep. 370, considered in the United States Circuit Court of Appeals before Judges Lurton and Taft and District Judge Clark. After reviewing the authorities the learned judge (Lurton)

said: 'But the validity of the statutes need not be rested upon mere authority. They find sanction in the dictates of natural justice and most often administer an equity which has recognition under every system of law. That principle is that every one who, by his labor or materials, has contributed to the preservation or enhancement of the property of another, thereby acquires a right to compensation. * * * The legal effect of the contract (between the owner and the contractor) is to give a lien to all who, at the instance of the contractor, shall be employed to furnish labor or materials for the work which he has let out. So far as such a contract is limited to future contract it cannot be said to impair the obligation of a contract.'

"If the law be subject to no other objection it impairs no contract for all thereafter may be made or entered into upon the basis of law. * * * Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is, and makes contract under the law. It is idle to say that under such circumstances he is deprived of his property without due process of law."

The Supreme Court of Louisiana in the case of *McKeon vs. Sumner Building and Supply Co.*, 51 La. Ann. 1961, quotes from Judge Lurton's opinion as follows:

"By implication, the contractor is the agent of the owner, and by implication the owner consents to the privilege of the working man on his property to the extent that he owes the contractor. *Jones vs. Great Southern Fireproof Hotel,* 86 Fed. Rep. 378."

The policy and benefit of such laws have been ably and clearly pointed out by this Court, as early as *Winder vs. Caldwell,* supra, and nearly all of the State Courts have adopted the same views. The liberty granted by the Constitution of the United States and the State of Ohio, is not intended to be a license for a person to do whatever he pleases in his individual acts or with his property. It is a liberty restrained by such legislative enactments as may be for the general public good, and what is for the public good is left for the determination of the legislative department of the government. The argument

as to whether the legislature has acted wisely in formulating and passing such acts, must be addressed to the legislature and not to the Courts.

The authorities already cited, and many more might be found to the same effect, clearly show that the act in question violates none of the contitutional privileges pointed out under the first three objections raised by the counsel for the petitioner, and no constitutional inhibitions can be found against these enactments, either in the state constitution of Ohio, or the Constitution of the United States.

Much more might be said upon this subject, but in view of the very able opinion rendered by the Court of Appeals, and the exhaustive argument made by other counsel for respondents upon the same question, we do not wish to tax the patience of the Court longer by additional citations upon these points. It remains only to consider the fourth and last objection made to the law, to-wit, that it is obnoxious class legislation.

## III.

### Class Legislation.

Counsel for the petitioner claim that the act in question is class legislation, which comes within the inhibition of the constitution. We have made a most thorough examination of the authorities, and we find but few cases in which counsel have had confidence enough in this point to raise it in the case of mechanics' liens, and in every case in which it was raised, the Courts have summarily brushed it aside as not being worthy of consideration.

If the act in question is class legislation, then all acts creating or establishing mechanics' liens are subject to the same objection. It seems to be generally admitted that the legislature has power over this subject. The authorities we have already cited seems to us to show conclusively the right of the legislature to enact the law in

controversy, provided it has authority in any manner to legislate upon the subject of mechanics' liens.

In *Summerlin vs. Thompson et al.*, 31 Fla. 369, the Court say in the fifth paragraph of the syllabus,—

> "The act of 1887 (Chapter 3747) is not amenable to the objection that it is unconstitutional, because it confers special powers or special jurisdiction upon the Courts, or changes the general rule of practice in favor of a class."

The case which was before the Supreme Court of Florida for consideration, involved the constitutionality of a mechanics' lien law, and the same question was raised in regard to this being special or class legislation, as is made in the case now before this Court.

Mabry, Judge, in delivering the opinion of the Court, on page 389 says,—

> "The constitutionality of the act is questioned on the ground that so much of it as confers special powers or special jurisdiction upon the Courts, in favor of a class, is unconstitutional. It is not denied that all persons similarly situated are equally affected by the act. Counsel cites no authority to sustain the position assumed. It is not tenable. Further discussion of it is unnecessary."

Only two other cases have been brought to our attention in which counsel have raised this point. They are the cases of,—

> *Davis vs. The State*, 3 Lea, (Tenn.) 380, and *Cole Mlg. Co. vs. Falls*, 90 Tenn. 471.

already cited under another paragraph of this brief.

This subject, however, has been ably and fully discussed by this Court, and many of the Courts of last resort in the different states, and lawyers and Courts throughout the United States seem to concede that legislation upon the subject of mechanics' liens is not open to the objection raised by counsel in this case.

In *Budd vs. New York*, 143 U. S. 517, this Court held that an act of the legislature of the State of New York, regulating the rates applied to charges for elevating grain, popularly known as the elevator cases, which applied only to cities having a population of 130,000 or

more, was not an infringement of the citizens' constitutional rights.

The following statement appears in the syllabus:—

> "An act of the legislature of New York (Laws of 88, Chapter 581) providing that the maximum charge for elevating, receiving, weighing and discharging grain, should not exceed five-eighths of one cent a bushel, and that in the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships, and canal boats, should only be required to pay the actual costs of trimming or shoveling to the leg of the elevator when unloading, and trimming cargo when loading; held,—that the act was a legitimate exercise of the police power of the state over a business affected with a public interest, and did not violate the Constitution of the United States, and was valid.
>
> "The case of *Munn vs. Illinois*, 94 U. S., 113, reviewed and adhered to, and its application in cases decided in the State Courts considered.
>
> "The decision in *Chicago, etc., Railway Co., vs. Minnesota*, 134, U. S. 418, explained.
>
> "Although the act of New York did not apply to places having less than 130,000 population, it did not deprive persons owning elevators in places of 130,000 population, or more, of the equal protection of the laws."

In *Wunderle vs. Wunderle*, 144 Ill. 40, the question of class legislation is discussed and the term defined.

In that case the Supreme Court of Illinois hold that the alien land law, which forbids the transfer of title, etc., of land to non-resident aliens, although under treaties with some foreign states, it could only apply to certain classes of non-resident aliens, is a valid enactment.

The Court say in the twenty-ninth paragraph of the syllabus,—

> "Laws are general and uniform when alike in their operation upon all persons in the like situation, and the fact of their being general and uniform, is not affected by the number of those within the scope of their operation."

In *Hing vs. Crowley*, 113 U. S. 703, Justice Field, in delivering the opinion of the Court, on page 708 says,—

> "The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the

just grounds of complaint, because like restrictions are not imposed upon another business of a different kind. The discriminations which are open to objections are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right, which all can claim in the enforcement of the laws."

See also,—

*Cooley's Constitutional Limitations, 5th Ed.*, 482-483.

See also the language of Justice Field in *Barbier vs. Connelly*, 113 U. S. 27, on pages 31 and 32 of the opinion of the Court.

The provision of the constitution invoked by the petitioner in this case is clearly and elaborately discussed by Judge McIlvane in *State vs. Powers*, 38 Ohio State 54. We call particular attention to the opinion on pages 62 and 63, and the authorities there cited.

We also call especial attention to the cases, of,—

*Barbier vs. Connelly*, 113 U. S. 27, 31-32.
*Kidd vs. Pearson*, 128 U. S. 1.
*New York vs. Squire*, 145 U. S. 175.

It is true the cases last cited are based upon the police power of the state, but the principles of law there enunciated, and the discussion as to what constitutes class legislation, are clearly applicable to the case at bar, and the police power as defined in these cases, is certainly broad enough to cover this case

We call attention to the decision of this Court in *Budd vs. New York*, 143 U. S. 517, already referred to. The enactment in that case was certainly open to all the objections raised against the act now in question, and this court held that the act was a legitimate exercise of the police power of the state over the business affected.

The decision of the Ohio Supreme Court in *Cleveland v. Construction Co.*, 67 O. S., 197, will hardly find favor in this court in view of the decision of this court in *Atkin v. Kansas*, 191 U. S., 207, where this court took a view of a similar law directly contrary to

that announced by the Supreme Court of Ohio in the last case above cited. It may also be added that the decision of the Ohio Supreme Court, reported in the 67 State Report, *supra*, is out of harmony with the decision of this court in *Holden vs. Hardy*, 169 U. S., 366.

Statutes creating liens in favor of mechanics are not class legislation of a character rendering them obnoxious to constitutional provisions of the various states. On the contrary they belong in that category of legislation which has for its object the general welfare and which may fairly be said to be covered by the broad term of the police power of the state under which such laws, in common with all others of a like character, are classable.

Many more authorities might be cited to the same effect, but it seems to us wholly unnecessary in view of the numerous decisions we have already cited upon other branches of the case, which also cover this phase of the case.

If the act in question is inhibited by the constitution because it is class legislation, then all mechanics' lien laws must fall under the same ban. We have found no authority nor any decision of any Court of last resort holding that such legislation is class legislation, and therefore within the inhibition of the constitution.

In conclusion, we again call especial attention to the opinion of the Circuit Court of Appeals delivered by Judge Lurton, and reported in 86 Fed. 370, which contains a full, clear and fair exposition of the law applicable to this case, and a very learned discussion of the constitutional principles raised, and although expressing regret at their inability to agree with the Supreme Court of Ohio, the Court of Appeals upheld the constitutionality of the law.

Respectfully submitted,

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